

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1837

Cir. Ct. No. 2014CV1354

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RURAL MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

LESTER BUILDINGS, LLC AND THE PHOENIX INSURANCE COMPANY,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,**

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

JIM HERMAN, INC.,

DEFENDANT-CO-APPELLANT,

V.

VAN WYKS, INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Dane County: MARYANN SUMI and VALERIE BAILEY-RIHN, Judges. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Rural Mutual Insurance Company appeals summary judgment dismissing its subrogation claims against Lester Buildings, LLC and its insurer, Phoenix Insurance Company, and against Van Wyks, Inc. and its insurer, West Bend Mutual Insurance Company, relating to damages to a barn owned by Rural Mutual’s insured, Jim Herman, Inc.¹ The circuit court determined that all of Rural Mutual’s claims are barred pursuant to a “waiver of subrogation” provision contained in the contract for the construction of the barn entered into between Lester Buildings and Jim Herman. Jim Herman separately appeals a judgment entered in favor of West Bend following the dismissal by the circuit court on partial summary judgment of any cross-claims by Jim Herman for consequential, incidental, liquidated or special damages. For the reasons discussed below, we affirm.

¹ The circuit court also dismissed on summary judgment Rural Mutual’s claim against Lester Buildings’ insurer, Phoenix Insurance Company. That claim is not at issue on appeal and we do not refer to it again in this opinion.

BACKGROUND

¶2 The procedural history of this case is lengthy and complicated. We set forth here only those facts relevant to our decision.

¶3 In 2009, Jim Herman entered into a contract with Lester Buildings for the design and construction of a barn on Jim Herman's property (the Lester Buildings contract). The Lester Buildings contract included the following provision addressing subrogation:

Both parties waive all rights against each other and any of their respective contractors, subcontractors and suppliers of any tier and any design professional engaged with respect to the Project, for recovery of any damages caused by casualty or other perils to the extent covered by property insurance applicable to the Work or the Project, except such rights as they have to the proceeds of such property insurance and to the extent necessary to recover amounts relating to deductibles of self-insured retentions applicable to insured losses.... This waiver of subrogation shall be effective notwithstanding allegations of fault, negligence or indemnity obligation of any party seeking the benefit or production of such waiver.

The Lester Buildings contract also contained two provisions addressing damages.

The contract provided:

[JIM HERMAN] ACKNOWLEDGES THAT ITS SOLE AND EXCLUSIVE REMEDY AGAINST LESTER SHALL BE LIMITED TO THE APPLICABLE WARRANTIES SET FORTH HEREIN AND NO OTHER REMEDY (INCLUDING BUT NOT LIMITED TO THE RECOVERY OF PROFITS, LOST SALES, INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR INJURY TO PERSON OR PROPERTY, OR ANY OTHER LOSS) SHALL BE AVAILABLE TO [JIM HERMAN] OR ANY OTHER PERSONS OR ENTITIES, WHETHER BY DIRECT ACTION, FOR CONTRIBUTION OR INDEMNITY, OR OTHERWISE.

The contract further provided: (1) “Lester shall not have any liability to [Jim Herman] whatsoever for any consequential, incidental, liquidated or special damages under or in connection with this Contract.”

¶4 Jim Herman separately contracted with Van Wyks to pour the foundation and install footings for the barn.

¶5 The barn was completed in June 2010. In May 2013, following strong winds, one half of the barn collapsed, killing or causing catastrophic injuries to cattle that were housed inside or near the barn. Jim Herman and Rural Mutual assert that the barn collapsed because steel rebar cages in the barn structure were installed several inches below where Lester Buildings’ design called for them to be installed, which weakened the column tops and led to the column tops cracking from the strong winds.

¶6 Rural Mutual, which insured the barn, paid Jim Herman \$607,378.37 to repair the barn, and an additional \$51,632.25 for losses related to cattle that died as a result of the barn’s collapse and for other miscellaneous damage to Jim Herman’s property. In 2014, Rural Mutual brought the present subrogation action against Lester Buildings, Van Wyks, and West Bend, seeking to recover the amounts it expended as a result of the barn’s collapse. Rural Mutual alleged that Lester Buildings breached the Lester Buildings contract by failing to construct the barn as called for in the contract, and that Lester Buildings was negligent in placing the rebar lower than called for in the contract. Rural Mutual’s allegations against Van Wyks were the same, albeit based on a separate contract. Rural Mutual alleged that Van Wyks breached its contract with Jim Herman by failing to construct the barn in a “good and workmanlike manner,” and that Van Wyks was negligent in placing the rebar lower than called for in its contract with Jim

Herman. Finally, as to West Bend, Rural Mutual alleged that “[i]n the event that Lester Buildings[] proves the allegations in its Third-Party Complaint, especially that Van Wyks[] was responsible in whole or in part for the [barn’s] collapse ... then under WIS. STAT. § 632.24 [(2015-16)],² West Bend [] is directly liable to [Rural Mutual].”

¶7 In the third-party complaint that Lester Buildings filed against Van Wyks, Lester Buildings alleged that Lester Buildings “will be entitled to judgment against ... Van Wyks [] for contribution and/or indemnification toward damages and costs awarded to [Rural Mutual]” in the event that Rural Mutual “should receive any judgment against ... [Lester Buildings] for [Rural Mutual’s] alleged damages caused by a breach of contract and/or negligence of Lester [Buildings].”

¶8 Jim Herman, who was joined as a defendant on Lester Buildings’ motion, filed cross-claims against West Bend, seeking to recover for damages it incurred as a result of the barn’s collapse, including consequential damages, reduced profit on sales, lost revenue, and additional clean-up costs. Jim Herman specifically alleged that “[i]n the event that Lester Buildings proves the allegations in its Third-Party Complaint, especially that Van Wyks[] was responsible in whole

² WISCONSIN STAT. § 632.24 authorizes a direct action against an insurer. It provides:

Any ... policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the ... policy, to the persons entitled to recover against the insured ... for injury to ... property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

or in part for the collapse of the [barn],” West Bend is directly liable to Jim Herman for damage and loss caused by Van Wyks.³

¶9 Lester Buildings, Van Wyks, and West Bend each separately moved for summary judgment against Rural Mutual, and West Bend moved for summary judgment against Jim Herman. Relevant here, Lester Buildings, Van Wyks, and West Bend each argued that the “waiver of subrogation” provision contained in the Lester Buildings contract barred Rural Mutual’s claims against them. In addition, West Bend sought dismissal of Jim Herman’s claim for “consequential, incidental, liquidated or special damages.”⁴

¶10 On July 11, 2016, the circuit court entered an order dismissing on summary judgment all of Rural Mutual’s claims against Lester Buildings, Van Wyks and West Bend. In its oral ruling, the court stated that Rural Mutual’s claims are precluded by the “waiver of subrogation” provision contained in the Lester Buildings contract. The circuit court also dismissed Jim Herman’s cross-claim for “consequential, incidental, liquidated or special damages” against West Bend, because the cross-claim was contingent on Lester Buildings’ prevailing in its third-party complaint against Van Wyks for contribution or indemnification.

³ Jim Herman also filed a cross-complaint against Lester Buildings, but Jim Herman’s claims against Lester Buildings are not at issue in this appeal.

⁴ Lester Buildings and West Bend also sought dismissal on summary judgment of any claims by Rural Mutual for “consequential, incidental, liquidated or special damages” on the ground that such damages are barred under the Lester Buildings contract. On appeal, both parties argue that any such damages are properly dismissed on summary judgment. We need not and therefore do not address those arguments because our decision disposes of this appeal. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶11 Jim Herman and West Bend subsequently reached a settlement as to any remaining claims brought by Jim Herman against West Bend that survived the circuit court's July 11, 2016 order. They stipulated that those claims may be dismissed and that Jim Herman reserved its right to appeal the circuit court's dismissal of Jim Herman's claim for "consequential, incidental, liquidated or special damages." Pursuant to the stipulation, a judgment dismissing West Bend as a defendant in Jim Herman's cross-claim was entered by the court.

¶12 Rural Mutual and Jim Herman separately appeal.

DISCUSSION

¶13 Rural Mutual appeals the circuit court's dismissal on summary judgment of its claims against Lester Buildings, West Bend and Van Wyks. Jim Herman appeals the circuit court's dismissal on summary judgment of Jim Herman's cross-claim against West Bend.

¶14 We review a circuit court's decision to grant or deny summary judgment de novo. *Hardy v. Hoeffler*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶15 Below, we separately address each of the dismissed claims that are challenged on appeal.

A. Rural Mutual's Claims

1. Claims against Lester Buildings

¶16 Lester Buildings argues that Rural Mutual's subrogation claims against it are entirely precluded by the "waiver of subrogation" provision contained in the Lester Buildings contract. To repeat, the provision, which we will refer to as the waiver provision, provides as follows:

Both parties waive all rights against each other and any of their respective contractors, subcontractors and suppliers of any tier and any design professional engage with respect to the Project, for recovery of any damages caused by casualty or other perils to the extent covered by property insurance applicable to the Work or the Project, except such rights as they have to the proceeds of such property insurance and to the extent necessary to recover amounts relating to deductibles or self-insured retention applicable to insured losses.... This waiver of subrogation shall be effective notwithstanding allegations of fault, negligence, or indemnity obligation of any party seeking the benefit or production of such waiver. (Emphasis added.)

¶17 Lester Buildings argues that there is no factual dispute that the damage to the barn was caused by a peril, more specifically a windstorm, and that because the damage was covered by property insurance issued by Rural Mutual, the waiver provision precludes Rural Mutual's claims against it.

¶18 Rural Mutual argues that the waiver provision does not preclude its claims against Lester Buildings because: (1) the waiver provision is void under WIS. STAT. § 895.447; and (2) even if the waiver provision is not void, it does not apply to the facts at hand.

¶19 We turn first to Rural Mutual’s argument that the waiver provision is void under WIS. STAT. § 895.447.⁵ Section 895.447 provides: “Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction ... of a building, structure, or other work related construction ... is against public policy and void.” The determinative question before us is whether the waiver provision at issue impermissibly “limit[s] or eliminate[s] tort liability” within the meaning of § 895.447 and is therefore void, as argued by Rural Mutual. Our construction of the waiver provision presents a question of law, which we review de novo. *Tufail v. Midwest Hospitality, LLC*, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586.

¶20 Rural Mutual devotes a substantial portion of its argument that the waiver provision is void under WIS. STAT. § 895.447, to a general discussion of how § 895.447 should be interpreted and under what various circumstances the statute should be applied. However, as stated above, the determinative question is what effect, if any, does the *specific* waiver provision *in this case* have on tort liability *here*. As to that question, Rural Mutual’s argument on appeal is woefully insufficient.

⁵ We note that although it appears to us that the economic loss doctrine might be implicated, the parties ignore the doctrine. We resolve this issue by resolution of the arguments the parties do present and, therefore, do not address what, if any, impact the economic loss doctrine would have.

In addition, we recognize that WIS. STAT. § 895.447 is directed at protecting a party’s ability to bring tort claims. It appears to us that only Rural Mutual’s negligence claim would be impacted by § 895.447.

¶21 Rural Mutual’s sole assertion in support of its argument that the waiver provision is void under WIS. STAT. § 895.447 is that “Lester [Buildings] ... [is] specifically using the [waiver] provision to ‘limit or eliminate [Lester Buildings’] tort liability’ towards Rural.” As best we can tell, Rural Mutual is asserting that Lester Buildings’ actions are evidence of its subjective intent as to the meaning of the language contained in the waiver provision.

¶22 “‘The ultimate aim of all contract interpretation is to ascertain the intent of the parties.’” *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751 (quoted source omitted). The subjective intent of contracting parties may, in some circumstances, be looked to as evidence of the meaning of contractual language. *See id.* However, where the terms of a contract are clear and unambiguous, the contract is construed according to its literal terms and we presume that the parties’ intent is evidence by the words they chose. *Id.*, *see also Tufail*, 348 Wis. 2d 631, ¶¶25-26. Rural Mutual does not argue that the language of the waiver provision is ambiguous as to whether it does or does not limit or eliminate tort liability. Accordingly, our focus is on the language of the waiver provision, not Lester Buildings’ intentions.

¶23 Rural Mutual does not explain how or why the terms of the waiver provision limit or eliminate tort liability. This court need not address inadequately briefed arguments and we choose not to do so here. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are inadequately briefed). As the party seeking to avoid application of the contract provision, Rural Mutual bears the burden of persuading this court that the provision is void. *See Kernz*, 266 Wis. 2d 124, ¶31.

Rural Mutual has not met that burden. Accordingly, we reject Rural Mutual’s argument that the waiver provision is void under WIS. STAT. § 895.447.⁶

¶24 Rural Mutual next argues that the waiver provision does not preclude its claims against Lester Buildings because the provision is not applicable to the facts at hand. Rural Mutual points out that the waiver provision is limited to “property insurance applicable to the Work or the Project ...,” but that “Work” and “Project” are not defined by the contract. Rural Mutual argues that the terms “Work” and “Project” unambiguously refer to the process of constructing the barn, not the completed barn, and, therefore, the provision has no application to claims arising after the barn’s construction was completed. In the alternative, Rural Mutual argues that even if “Work” and “Project” do not unambiguously refer only to the construction of the barn, the terms are ambiguous as to what they entail and as such, the waiver provision must be construed against Lester Buildings and cannot be enforced against Rural Mutual.

¶25 Lester Buildings argues that it is apparent from the unambiguous, “clear terms” of the waiver provision that the provision is not limited in application to claims arising during the construction of the barn. Lester Buildings asserts that the provision “expressly contemplates” that any damage “subject to” the waiver provision will be “subject to” a claim under a property insurance policy, which would cover the completed barn and its contents. Lester Buildings

⁶ Even if we were to decide whether the waiver provision is void under WIS. STAT. § 895.477, we would conclude that it was not. The language of the provision limits Jim Herman from recovering from Lester Buildings damages that were covered by insurance and it limits recovery by an insurer for damages paid under a policy of insurance. However, the language of the provision does not limit Jim Herman from recovering against Lester Buildings in all circumstances. For example, if the barn’s collapse were not covered by a policy of insurance, nothing in the waiver provision limits or eliminates Lester Buildings’ tort liability.

points out that if the provision was intended to apply only during construction, it could have limited the waiver provision to payments made pursuant to a builders-risk policy or explicitly noted that that waiver applied to property insurance covering the time during the construction of the barn.

¶26 The waiver provision provides in relevant part as follows: “Both parties waive all rights against each other ... with respect to the Project, for recovery of any damages caused by casualty or other perils to the extent covered by property insurance applicable to the Work or the Project” The meaning of the words “Work” and “Project” is pivotal to the interpretation of the waiver provision in this case. If neither term refers to the barn once completed, the waiver provision does not apply to bar Rural Mutual’s claims against Lester Buildings.

¶27 When we construe the terms of a contract, we give the terms contained therein their plain and ordinary meaning. *Goldstein v. Lindner*, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. If the words of a contract convey a clear and unambiguous meaning, we do not look outside the policy language. *Id.*; see also, *Energy Complexes, Inc. v. Eau Claire Cnty.*, 152 Wis. 2d 453, 467-68, 449 N.W.2d 35 (1989) (parole evidence is not admissible if the terms of a contract are unambiguous).

¶28 The Lester Buildings contract does not define “Work” or “Project.” When a term is not defined in a contract, “dictionary definitions are dispositive of the ordinary meanings ascribed to contract terms.” *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 507, 577 N.W.2d 617 (1998). “Work” is defined as the “activity in which one exerts strength or faculties to do or perform ... something that results from a particular manner or method of working, operating,

or devising.” *Work*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993). It is also defined as “something that has been done, made ... as a result of one’s occupation, effort, or activity,” *Work*, AMERICAN HERITAGE DICTIONARY (1985), and as “something produced or accomplished by effort, exertion, or exercise of skill.” MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/work?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited April 23, 2018). “Project” is defined as “a specific plan or design.” *Project*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993).

¶29 Giving the terms “Work” and “Project” their commonly defined meaning in the context of the waiver provision as a whole, we conclude that the terms include both the process of constructing the barn, as well as the completed result. “Work” is defined as including the “result[]” of “a particular manner or method of working” and “one’s occupation, effort, or activity,” as well as something that is “produced” by “effort, exertion, or ... skill.” In addition, the contract limits the waiver of subrogation to damages that are “covered by [applicable] property insurance.” It is generally understood that property insurance provides financial reimbursement to an insured for damages to structures and their contents that comprise the insured’s “property.” Were we to conclude here that the completed barn was not included in the definition of “Work” or “Project,” the result would render the waiver provision nonsensical. Not only would the provision not apply to the completed barn, but it would also not apply before the barn was completed because until the barn was completed there would be nothing to insure under a property insurance policy. See *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶62, 319 Wis. 2d 274, 767 N.W.2d 898 (we interpret contracts to avoid absurd results). Accordingly, we reject Rural Mutual’s argument that the waiver provision applies only to damages arising during the

construction of the barn and not to any damages that arise after the barn was completed.

2. *Claims Against Van Wyks*

¶30 The circuit court determined that Rural Mutual’s claims against Van Wyks are precluded as a result of the waiver provision contained in the Lester Buildings contract with Jim Herman. Rural Mutual does not dispute the circuit court’s determination that the Lester Buildings contract waiver provision applies to Van Wyks. Accordingly, we treat any argument that the waiver provision does not apply to Van Wyks as having been forfeited. Rural Mutual’s arguments on appeal as to its claims against Van Wyks are the same arguments it makes as to its claims against Lester Building. Specifically, that the waiver provision is either void or has no application to the barn once completed. As we explained above, the waiver provision is not void and does apply to the completed barn. Accordingly, we reject Rural Mutual’s arguments and conclude that summary judgment in favor of Van Wyks is proper.

¶31 Even if it were disputed, Jim Herman’s contract with Van Wyks provides that: “*Both parties waive all rights against each other and any of their respective contractors, subcontractors and suppliers.*” (Emphasis added.) Clearly, Van Wyks is a contractor of Jim Herman, whether or not Van Wyks has any relationship to Lester Buildings. Therefore, this provision bars Rural Mutual’s claims.

3. *Claim Against West Bend*

¶32 Rural Mutual alleged as follows in its complaint against West Bend: “In the event that Lester Buildings[] proves the allegations in its Third-Party

Complaint, especially that Van Wyks[] was responsible in whole or in part for the [barn's] collapse ... then under WIS. STAT. § 632.24, West Bend [] is directly liable to [Rural Mutual].”

¶33 West Bend argues that the circuit court properly granted summary judgment in its favor because: (1) Rural Mutual’s claim against West Bend was expressly contingent upon Lester [Buildings] prevailing on its claims against Van Wyks; (2) Lester Buildings’ claims against Van Wyks were only for contribution and indemnification in the event that Lester Buildings was found liable to Rural Mutual; (3) Rural Mutual’s claims against Lester Buildings were dismissed; and (4) therefore, Lester Buildings has no indemnification and/or contribution claim against Van Wyks and the contingency for West Bend’s liability specified by Rural Mutual in its allegation against West Bend cannot be triggered.

¶34 Rural Mutual argues that its claim against West Bend is contingent only on Lester Buildings proving that Van Wyks was responsible for the barn’s collapse, but that its claim is “simply not contingent” on Rural Mutual recovering against Lester Buildings. We are not persuaded.

¶35 In *City of Milwaukee v. Milwaukee Civic Dev., Inc.*, 71 Wis. 2d 647, 239 N.W.2d 44 (1976), the City brought a breach of contract action concerning land the city had contracted with the defendant to develop. The defendant counterclaimed for the value of improvements it made to the land in the event that the city was found to be entitled to the property. *Id.* at 651. The supreme court rejected the argument that the counterclaim was “a ‘fully ripened money demand which was not inchoate or contingent.’” *Id.* at 660. The supreme court found that the counterclaim was contingent—the defendant sought “to be

recompensed ... only in the event the City [was] decreed as the owner” of the property. *Id.*

¶36 In the present case, Rural Mutual sought to be recompensed by West Bend for damages and losses caused by Van Wyks only “[i]n the event that Lester Buildings[] proves the allegations in its Third-Party Complaint.” Similar to the counterclaim in *City of Milwaukee*, Rural Mutual’s allegation as to West Bend is contingent—it is premised upon the condition that Lester Buildings proves its allegations in its third-party complaint for contribution or indemnification against Van Wyks. Lester Buildings’ third-party complaint for contribution or indemnification is, in turn, contingent upon Rural Mutual receiving a judgment against it. In short, we deal here with a contingency upon a contingency: the contingency that Rural Mutual acknowledges, namely, Lester Buildings proving its allegations in its third-party complaint against Van Wyks; and also the contingency that Rural Mutual recovers against Lester Buildings, so that Lester Buildings has something to seek contribution or indemnification for. Because Rural Mutual’s claims against Lester Buildings were properly dismissed, neither contingency has been met. Accordingly, we conclude that summary judgment dismissing Rural Mutual’s claim against West Bend was proper.

B. Jim Herman’s Claim Against West Bend

¶37 Jim Herman contends that the circuit court erred in dismissing on summary judgment any of his cross-claims against West Bend for consequential, incidental, liquidated, or special damages.

¶38 West Bend argues that summary judgment was appropriate because Jim Herman’s cross-claim against it was contingent on Lester Buildings proving its third-party complaint against Van Wyks for contribution and/or

indemnification for any damages or costs awarded to Rural Mutual in the event that Rural Mutual “receive[s] any judgment against ... [Lester Buildings] for [Rural Mutual’s] alleged damages caused by a breach of contract and/or negligence of Lester [Buildings].”

¶39 Jim Herman argues that its cross-claim against West Bend was not contingent on Lester Buildings prevailing in Lester Buildings’ third-party action against Van Wyks, but was instead a direct, non-contingent claim against West Bend. Jim Herman asserts that his cross-claim against West Bend “simply states that if there is sufficient proof to find Van Wyks at fault for the barn collapse, then [Jim] Herman is entitled to recover from Van Wyks’ insurer, West Bend.” Jim Herman argues that because its claim against West Bend was a direct, non-contingent claim, Lester Buildings’ liability does not limit or restrict whether Jim Herman may recover consequential, incidental, liquidated, or special damages from West Bend.

¶40 In its cross-claim against West Bend, Jim Herman alleged as follows:

In the event that Lester Buildings proves the allegations in its Third-Party Complaint, especially that Van Wyks, Inc. was responsible in whole or in part for the collapse of the [barn], then, in that event, West Bend Mutual Insurance Company is directly liable to Jim Herman, Inc. for the damage and losses caused by Van Wyks, Inc., pursuant to [WIS. STAT.] § 632.24, and is a proper party to this action pursuant to [WIS. STAT.] § 803.04.

¶41 Relying on WIS. STAT. § 632.24, Jim Herman argues that its claim against West Bend “by definition ... could not be contingent upon anything Lester Buildings did or did not do.” Section 632.24 provides:

Any ... policy of insurance covering liability to others for negligence makes the insurer liable, up to the

amounts stated in the ... policy, to the persons entitled to recover against the insured ... for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

Jim Herman asserts that under § 632.24, “any party can use a direct action to prove an insured’s negligence and [an insurance] carrier’s attendant liability.” Jim Herman goes on to assert that a direct action against West Bend “is exactly the right [Jim Herman] asserted ... in its [cross-]claim” against West Bend. As best we can tell, Jim Herman argues that the allegations in its cross-complaint gave notice to West Bend “that the substance” of Jim Herman’s claim is a direct action against West Bend based on proof of the negligence of West Bend’s insured, Van Wyks.

¶42 We agree that WIS. STAT. § 632.24, Wisconsin’s “direct action statute,” permits a defendant to maintain a direct action against an insurer if the insurer provides insurance for damages caused by negligence. *See Decades Monthly Income and Appreciation Fund v. Whyte & Hirschboeck, S.C.*, 173 Wis. 2d 665, 670, 495 N.W.2d 335 (1993). However, nothing in the statute provides that any claim brought under that statute is a direct, non-contingent claim.

¶43 The language of Jim Herman’s allegation against West Bend is largely identical to the language of Rural Mutual’s allegation against West Bend, which we discussed above in ¶¶32-36. For the same reasons discussed above, we conclude that Jim Herman’s allegation against West Bend is contingent upon Lester Building’s proving its allegations in its third-party complaint against Van Wyks, which was in turn contingent upon Rural Mutual prevailing in its action against Lester Buildings. As we explained above, none of the contingencies

have been or can be met because Rural Mutual's claims against Lester Buildings are precluded. Accordingly, we conclude that Jim Herman's claim for consequential, incidental, liquidated, or special damages was properly dismissed on summary judgment.

CONCLUSION

¶44 For the reasons discussed above, we affirm.⁷

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁷ To the extent that we have not addressed an argument raised on appeal, we do not reach that argument because our decision is otherwise dispositive.

